

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
PHARMACY CASES LITIGATION )

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BEFORE: THE HONORABLE RYA W. ZOBEL AND  
THE HONORABLE JENNIFER C. BOAL

**MOTION HEARING AND  
STATUS CONFERENCE**

John Joseph Moakley United States Courthouse  
Courtroom No. 12  
One Courthouse Way  
Boston, MA 02210

December 4, 2014  
2:00 p.m.

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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on December 4, 2014.)

THE COURT: Good afternoon. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is New England Compounding. It's 13-MD-2419.

THE COURT: Let me propose that -- I think we had agreed that the motions would be heard first. I would like to give each of the -- there are three motions -- each of the defendants ten minutes. I assume that the plaintiffs will be perfectly content to rely on their papers and my earlier decisions. Yes? Mr. Stranch -- oh, I'm sorry, what is your name, please?

MS. DOUGHERTY: Kim Dougherty, your Honor, from Janet Jenner & Suggs. I represent the plaintiffs involved in the motions brought on behalf of Dr. Glaser and Encino and we would be happy to rely on your earlier decisions.

THE COURT: Thank you.

MS. DOUGHERTY: Unless there's something else you have questions about.

THE COURT: Okay. So, those of you who are arguing

1 over telephone, each motion should take no more than ten  
2 minutes to argue. The plaintiffs rely on their briefs and the  
3 decisions earlier, which they cite in their briefs. So, we  
4 will start with -- I'm not exactly sure of the order.

5 MS. JOHNSON: Your Honor, if I may.

6 THE COURT: I guess we'll start with the one filed in  
7 the MDL, which is Gururau Sudarshan and Cincinnati Pain  
8 Management Consultants, and would counsel please identify  
9 yourself.

10 MS. JOHNSON: Your Honor, I don't believe the  
11 Cincinnati Pain motion is on.

12 THE COURT: It isn't?

13 MS. JOHNSON: I can hand you what the Plaintiffs'  
14 Steering Committee filed, which identified four motions for  
15 argument. Of those, there are really only two that go today.  
16 I, unfortunately, only have one copy, but I'll hand this to  
17 you in just a moment.

18 THE COURT: Wait a minute. I can go back to the  
19 December agenda. Where on the agenda does it appear, Ms.  
20 Johnson?

21 MS. JOHNSON: ECF No. 1563, your Honor, which  
22 identified four motions for the Court. Of those, there are  
23 two I would like to briefly address just to explain why they  
24 do not need to be argued today.

25 THE COURT: So, which two do we have to hear?

1 MS. JOHNSON: Numbers two and three, your Honor. The  
2 first was resolved by a forthcoming stipulation and the --

3 THE COURT: That's one of the new numbers, right?

4 MS. JOHNSON: Yes.

5 THE COURT: That one we hear?

6 MS. JOHNSON: Yes.

7 THE COURT: Which is -- here it is. This is No. 38  
8 in 14-12884, different docket number.

9 MS. DOUGHERTY: Yes, your Honor.

10 THE COURT: And the other one is Glaser?

11 MS. JOHNSON: Yes, your Honor.

12 MR. STRANCH: That is correct. Thank you, your  
13 Honor.

14 THE COURT: Which is Docket No. 27, also in 12884.

15 MS. JOHNSON: That's correct.

16 THE COURT: Why don't these cases have -- why don't  
17 they have the MD number?

18 MS. JOHNSON: I believe these are motions to dismiss  
19 that were filed in individual dockets because they related to  
20 individual cases. So, that case is a member of the MDL, but  
21 it was not filed in the master MDL docket.

22 THE COURT: Can't we put them all in the master MDL  
23 docket?

24 MS. JOHNSON: I think that's an excellent idea, your  
25 Honor.

1 THE COURT: How can we do that?

2 MS. JOHNSON: We can -- the SPC can file a proposed  
3 order that requires all filings be made in the master MDL  
4 docket, and we will do that.

5 THE COURT: All of these independent cases go into  
6 the master docket as well. There's a whole pile of them  
7 that's there.

8 MS. JOHNSON: Yes, that's right. We will endeavor to  
9 put a proposed order in front of you and also speak with the  
10 clerks to come up with a solution to this problem.

11 THE COURT: I appreciate that as always. Okay.

12 So, who would like to address the motion by Encino  
13 Outpatient Surgery to dismiss?

14 MS. PALIN: Your Honor, Cynthia Palin, appearing on  
15 behalf of Encino. I will address our motion to dismiss.

16 THE COURT: Okay. I'll hear you. Ten minutes, no  
17 more.

18 MS. PALIN: Yes, your Honor.

19 As set forth in our motion to dismiss, without  
20 notifying any of the California defendants, and that would be  
21 Encino, Dr. Glaser and The Pain Institute, plaintiff filed the  
22 action in the federal court in California, and without giving  
23 notice and without serving them, transferred the matter to  
24 your court in Massachusetts. Defendants -- or plaintiffs then  
25 served defendants with a summons issued by the federal court

1 in Massachusetts.

2 Plaintiffs argue that that's proper because either  
3 the bankruptcy rules allow us to do that or there is some  
4 basis for nationwide service of process.

5 We disagree. As cited in my moving papers in the  
6 *Omni Capital National Limited vs. Rudolph Wolff & Company*  
7 *Limited* case, the Court has made clear that service of a  
8 summons is an issue of due process. Under the Federal Rules,  
9 Civil Procedure Rule 4(k), either the state of Massachusetts  
10 would have to have jurisdiction over the defendants, which it  
11 does not. These defendants have absolutely no contact with  
12 the state of Massachusetts. They are California residents and  
13 California corporations who do not conduct any business or  
14 treat anyone in Massachusetts.

15 Likewise, Massachusetts' long-arm statutes would not  
16 permit service of the summons on California residents who have  
17 no contact with that state. Therefore, there must be a  
18 federal statute that authorizes service.

19 All of the causes of action pled in plaintiff's  
20 complaint are state causes of action and California  
21 substantive law applies, whether we are in federal court or  
22 not. Under Rule 4(k), there is no authorization for service  
23 of process or for service using a Massachusetts summons.

24 I don't believe you can use the bankruptcy rule.  
25 We're not in the bankruptcy court. The bankruptcy rules for



1 service of process don't apply to this lawsuit. We've  
2 governed by the Federal Rules of Civil Procedure and there's  
3 no basis for service of a Massachusetts summons on a  
4 California entity under Rule 4(k), and on that basis, I think  
5 the motion to dismiss should be granted.

6 Secondly, as noted by Dr. Glaser in his motion to  
7 dismiss, NECC is not a party to this lawsuit. Plaintiffs are  
8 relying on the fact that they filed a claim in the bankruptcy  
9 action, and we contend that that is not sufficient. There's  
10 no cross-complaint in this lawsuit against NECC. NECC is  
11 clearly not a party.

12 There is also no cause of action in plaintiff's  
13 complaint asserting that defendants are vicariously liable for  
14 anything that NECC did or didn't do. Therefore, any recovery  
15 here against the California defendant would be on the basis of  
16 California defendant's negligence or alleged liability without  
17 regard to NECC and -- because there is no allegation in any of  
18 the causes of action for vicarious liability. So, on that  
19 basis, I don't believe there is any related-to jurisdiction.

20 The defendants in this case have made a very  
21 conscientious decision to not file a claim or file a cross-  
22 complaint against NECC for this very reason. We have walked  
23 away from those claims because we know that asserting the  
24 claims would confer related-to jurisdiction.

25 I don't think plaintiffs' mere filing of a claim in

1 the bankruptcy action gives this Court that related-to  
2 jurisdiction. There is no crossover. There's no cause of  
3 action asserting any kind of vicarious liability on the  
4 California defendants' part for the action of NECC. So, on  
5 that basis, I don't think that there is related-to  
6 jurisdiction.

7 Also raised by Glaser, the plaintiffs in this action  
8 aren't the proper party plaintiff. California substantive law  
9 applies under California law. The fiancée or live-in partner  
10 of a decedent has no cause of action, even if decedent was  
11 supporting her, paying all of her expenses and she was  
12 completely dependent on him financially. Under California  
13 substantive law, she has no cause of action arising out of his  
14 wrongful death.

15 As for his children, no one has appointed as the  
16 personal representative. So, the plaintiffs can't pursue this  
17 action as well and for this third reason, we believe the  
18 motion to dismiss should be allowed. I will --

19 THE COURT: Excuse me. The title of the case --  
20 she's suing as executor. Why can't she do that?

21 MS. PALIN: Under California law, she has to be  
22 appointed as a personal representative. The executor of the  
23 will doesn't have the procedural right to bring an action  
24 until she's been appointed by the probate court as a personal  
25 representative, especially when there are other heirs, but I

1 would defer to Dr. Glaser's counsel and give the rest of my  
2 time to her so that she can also be heard.

3 THE COURT: Okay. Thank you. Ms. Hanning.

4 MS. HANNING: Yes, your Honor. Stephanie Hanning on  
5 behalf of defendants Dr. Glaser and The Pain Institute.

6 One of the big issues we find is that the state of  
7 the pleadings, it affects the jurisdiction and it affects the  
8 substantive claims. The complaint was originally filed in  
9 California with Barbara Myer listed as the successor in  
10 interest and four of the decedent's heirs. It also said that  
11 Ms. Luna would file papers to be appointed the personal  
12 representative. So, clearly, she has not been appointed the  
13 personal representative.

14 THE COURT: How do I know that? She says she is.

15 MS. HANNING: I don't believe she does, your Honor.  
16 The original complaint says that she will file papers to be  
17 appointed personal representative, which implies that she has  
18 not yet done that, and the amended complaint does not  
19 reference a personal representative whatsoever.

20 THE COURT: Okay.

21 MS. PALIN: And she would have a court order, your  
22 Honor, that would be attached.

23 THE COURT: Okay. Anything else?

24 MS. HANNING: Yes. This causes a problem with the  
25 wrongful death claim because the wrongful death can only be

1 asserted by personal representative for the heirs. As  
2 plaintiffs point out, if there is a personal representative,  
3 then the heirs do not also have a cause of action. If there  
4 is no personal representative, then all of the heirs have to  
5 be joined.

6 We don't know, based on the state of the pleadings,  
7 what's going on here because the amended complaint in the  
8 caption also lists Michelle Luna as executor, and plaintiffs  
9 claim that the parties omitted from the caption are  
10 incorporated by reference, but we don't have any caselaw that  
11 says you can incorporate parties by reference. You can  
12 incorporate facts, but we don't have any authority that says  
13 you can omit parties from your caption and still assert claims  
14 on behalf of those parties and against those parties.

15 The state of the pleadings also affects the survival  
16 claims, all of the claims that are asserted on behalf of  
17 decedent, because, again, only -- survival claims can only be  
18 asserted by a personal representative or if not, a successor  
19 in interest.

20 The original complaint says that Barbara Myer was the  
21 successor in interest. The new complaint -- the amended  
22 complaint apparently claims that Michelle Luna is the personal  
23 representative. We don't know who is asserting this claim,  
24 and the original complaint does not delineate who is asserting  
25 each cause of action. So, at best, the complaint is uncertain

1 based on the amended pleadings and the failure to comply with  
2 California law.

3 THE COURT: Thank you.

4 That is an issue that I have not previously decided  
5 and I don't think it's really touched on in the plaintiff's  
6 memorandum. Do you wish to address it briefly?

7 MS. DOUGHERTY: Yes, your Honor. First, I just --

8 THE COURT: Could you, please, give me your name  
9 again?

10 MS. DOUGHERTY: Sure. Kim Dougherty on behalf of the  
11 plaintiffs.

12 THE COURT: Kim?

13 MS. DOUGHERTY: Yes, your Honor. Kim Dougherty on  
14 behalf of the plaintiffs in this matter.

15 We do address much of what's discussed here in our --

16 THE COURT: Personal representative?

17 MS. DOUGHERTY: In our papers. We have filed all of  
18 the paperwork, your Honor. Unfortunately, we are waiting on  
19 the probate court to make the appointment.

20 But one thing I would like to just note is some of --  
21 a reply was filed without seeking leave of court. We have not  
22 had the opportunity to file a sur-reply. We would like the  
23 opportunity, if we are just resting on the papers, to clarify  
24 some of these things, but I will clarify here in this court  
25 some of the issues that have been raised.

1           We have filed for Ms. Luna to be appointed as  
2       personal representative of the estate in compliance with both  
3       California and Massachusetts law. We are waiting on the court  
4       to appoint her. That's not something that we really have a  
5       lot of control over. We have to wait for the probate court.

6           However, your Honor, there is caselaw to support  
7       specifically that when you are in circumstances like this.  
8       There's a case called *Bolles vs. Lebowitz*, and it's One F.  
9       Supp. 2d. 67 at Page 72, and this is a District Court of  
10      Massachusetts case that basically says that -- holds that when  
11      a plaintiff is appointed the administrator of the decedent's  
12      estate in an action on behalf of the decedent after the  
13      defendant filed its motion for summary judgment, it  
14      essentially cures any defect in the plaintiff's original  
15      complaint.

16           So, I think courts are aware of the fact that not  
17      often are plaintiffs in control of the probate court when they  
18      need to file a lawsuit within the timeframe of the statute of  
19      limitations. So, we are in that --

20           THE COURT: So, what do you want me to do?

21           MS. DOUGHERTY: At this point I believe that it  
22      should be denied because the probate court is who we're  
23      waiting on in terms of the pending issues with respect to  
24      getting the estate appointed. It's pretty clear in our papers  
25      who we are seeking relief on behalf of.

1           And just to fill in the Court, the -- Ms. Luna is the  
2       personal representative who is set forth within the will as  
3       the executrix of the estate. Ms. Myer is the sole beneficiary  
4       of the estate.

5           One of the things that my sister counsel has ignored  
6       to tell your Honor is the fact that not only can Ms. Myer  
7       collect as the sole beneficiary of the estate and Ms. Luna  
8       bring the action on behalf of the estate, adult children,  
9       which Ms. Luna is one of, can also recover under both the  
10      Massachusetts and the California wrongful death statutes for  
11      loss of consortium. So, they are appropriate parties and they  
12      are potential beneficiaries if, in fact, a jury decides that  
13      we prove our claims.

14          With respect to who is a party and who is not a  
15      party, your Honor, the original complaint was very clear. It  
16      named the defendants. It named New England Compounding  
17      Center. That is why the case got transferred under 1407.

18          In the short form complaint, which is an  
19      administrative tool, your Honor, as you're aware, we fully  
20      incorporated by reference and attached both the long form  
21      original California complaint and the master complaint and we  
22      adopted all of that. Rather than filing a new short form  
23      complaint, your Honor, that's another 45 pages, we adopted it,  
24      and that was the process that this Court set up in order for  
25      us to efficiently move forward and bring this case in the MDL

1 and name all the parties that we need to and serve them.

2 Sister counsel has not stated anything that has shown  
3 that service has been improper. When the summons issued --  
4 so, I'll just give you some procedural background.

5 We filed the complaint in federal court in California  
6 on June 2nd. Within four weeks it was transferred to the MDL.  
7 At that point in time we can't serve it. It's not in -- it's  
8 not in California anymore. Within four weeks it transferred  
9 under 1407. We filed our short form amended complaint within  
10 another four weeks and we properly served within the time  
11 allotted.

12 They cannot deny they have been served this  
13 complaint, the original complaint, the master complaint, and  
14 the short form complaint. Service is entirely appropriate  
15 here, your Honor, and --

16 THE COURT: Okay. Let me ask you with respect to the  
17 representation. When were the probate papers filed?

18 MS. DOUGHERTY: The probate papers -- we have a  
19 probate lawyer. I'll have to double-check that, your Honor.

20 THE COURT: Approximately.

21 MS. DOUGHERTY: Approximately -- I'm not exactly  
22 sure.

23 THE COURT: I mean, was it yesterday or was it a  
24 month or two?

25 MS. DOUGHERTY: It was not yesterday, your Honor, no.



1 It's been several weeks that they've been pending.

2 THE COURT: Do you have any notion as to how quickly,  
3 as a matter of practice, the probate court acts on those  
4 papers?

5 MS. DOUGHERTY: Well, we anticipate that it should be  
6 within a couple of weeks if it goes within the normal course  
7 of business that we see.

8 THE COURT: Well, it seems to me that I should simply  
9 hold onto these motions until I hear from counsel that the  
10 probate court has acted one way or the other. It doesn't seem  
11 to make sense to throw it out if, in fact, the probate court  
12 decides not to appoint Ms. Luna and then start all over again.

13 MS. DOUGHERTY: Yes. And I can tell you that there  
14 have been absolutely no objections to her appointment.  
15 There's no issues over the will.

16 THE COURT: I know, but it is at the moment not  
17 appropriate, I think, for her to act as personal  
18 representative unless the probate court says so. I don't  
19 think you disagree with that assertion.

20 MS. DOUGHERTY: Your Honor, I don't disagree at all.  
21 I think it's a good idea.

22 THE COURT: I will take the papers. I will not do  
23 anything until I'm advised by both counsel in each case to --  
24 that the probate matter has now been resolved, okay?

25 How about that, Ms. --

1 MS. PALIN: Your Honor, Cynthia Palin, again, on  
2 behalf of Encino.

3 If those papers are, in fact, filed and served, we  
4 would like an opportunity then to submit a further brief that  
5 addresses those issues in light of whatever ruling the  
6 court -- probate court has issued.

7 THE COURT: Well, I don't quite understand that  
8 because you're saying these papers are defective in one  
9 respect, that she has not been appointed personal  
10 representative. If she's appointed personal representative,  
11 then that objection goes away and I don't know why we should  
12 start over again, right?

13 MS. HANNING: Your Honor, if I may. Stephanie  
14 Hanning on behalf of the Glaser defendants.

15 One of the other issues, though, is, again, who is a  
16 party to this action. Even if Ms. Luna is appointed personal  
17 representative, then Barbara Myer cannot assert survival  
18 causes of action. The survival causes of action then belong  
19 to the personal representatives. The other heirs cannot  
20 assert survival cause of action. If there's one cause of  
21 action, it's asserted by the personal representative. Those  
22 claims should be dismissed with the -- along with the wrongful  
23 death claim. Ms. Myer cannot assert a wrongful death claim.

24 THE COURT: Okay. Let's do it this way. That both  
25 sides, the plaintiffs and defendants, will file a joint

1 statement when the probate court has acted and tell me what  
2 the probate court has decided, and the defendants will have a  
3 couple of weeks to file any additional explanation of why the  
4 probate court's position doesn't solve the problem. Maybe  
5 counsel can even talk to each other and resolve the problem by  
6 agreement.

7 MS. PALIN: Thank you, your Honor.

8 THE COURT: Thank you.

9 MS. HANNING: Thank you, your Honor.

10 THE COURT: So, we will go off the telephone now and  
11 back to the regular agenda. Thank you all.

12 MS. PALIN: Thank you, your Honor.

13 MS. HANNING: Thank you.

14 THE COURT: And, Ms. Johnson, the -- let's see. The  
15 other motion was Luna against Unifirst. That one was not on  
16 for today? No, we didn't just hear that one, did we? We  
17 heard Luna against --

18 MS. JOHNSON: That's not on.

19 THE COURT: We did hear that. That was part of --

20 MS. DOUGHERTY: What we just heard, yes.

21 THE COURT: Luna against Unifirst and Luna against  
22 Encino, right?

23 MS. DOUGHERTY: Yes, your Honor.

24 THE COURT: So, those are the two that we dealt with.  
25 And let me return to you your document, which I'm sure you

1 will need.

2 MS. JOHNSON: Thank you, your Honor.

3 THE COURT: And with respect to Liberty's summary  
4 judgment motion, that is not to be heard today?

5 MS. JOHNSON: Well, we have a bit of a predicament on  
6 that one, your Honor. The plan had been to have that argument  
7 heard today. Mr. Jarnagin was going to argue on behalf of the  
8 Plaintiffs' Steering Committee. As I understand, he was not  
9 able to make his flight this morning for some personal  
10 reasons. I think Mr. Jarnagin is on the phone and is prepared  
11 to address that by phone if the Court would permit.

12 THE COURT: That was on for today?

13 MS. JOHNSON: Yes.

14 MR. SPEARING: If I may, your Honor. Scott Spearing  
15 for Liberty.

16 I think it was -- what we tried to put on today was  
17 oral argument on the PSC's 56(d) motion in opposition. So,  
18 there is no opposition to the motion for summary judgment.

19 Liberty's position is that if the Court were to rule  
20 on the plaintiffs' motion, deny the 56(d) motion, then the  
21 Court could simply enter judgment on the summary judgment  
22 motion because there is no other opposition, but if Mr.  
23 Jarnagin can't argue -- if we could set a date for next week  
24 to argue that, that would be fine with Liberty.

25 THE COURT: Well, you might as well do it today if we

1 can do it in the same ten minutes.

2 MR. SPEARING: Okay.

3 THE COURT: Now, you represent?

4 MR. SPEARING: I represent Liberty Industries,  
5 Liberty.

6 THE COURT: So, I should hear first from the  
7 proponents of the 56(d) motion.

8 MR. SPEARING: Yes, your Honor.

9 THE COURT: You're opposing it?

10 MR. SPEARING: That's correct.

11 THE COURT: Okay. Ms. Johnson, are you going to do  
12 that?

13 MS. JOHNSON: I'm hoping that Mr. Jarnagin is on the  
14 telephone.

15 THE COURT: Mr. Jarnagin, are you there?

16 (No response.)

17 THE COURT: How do we get him?

18 (Discussion off the record at the bench.)

19 MS. JOHNSON: Your Honor, I suggest that the  
20 Plaintiffs' Steering Committee will rest on the papers.

21 THE COURT: That's Mr. Jarnagin -- no. He is --

22 MS. JOHNSON: He was arguing on behalf of the  
23 Plaintiffs' Steering Committee.

24 COURTROOM DEPUTY CLERK URSO: I did send him the  
25 number this morning and spoke to his -- well, texted his

1 secretary with the number and she sent me a confirmation back  
2 saying that he would appear on the telephone to argue and  
3 that's why I printed that out for you, Judge, to let you know,  
4 but I'm not sure.

5 MS. JOHNSON: So, we will rest on the papers, your  
6 Honor.

7 MR. SPEARING: If they rest on the papers, we can do  
8 so also.

9 I would just like to add for purposes of Liberty's  
10 position is that in addition to the 56(d) motion that they  
11 filed, our opposition was that the motion was not proper.  
12 There was not a proper affidavit to meet the requirements of  
13 56(d), and one of the requirements -- or one of the issues  
14 that was raised by the Plaintiffs' Steering Committee was that  
15 they wanted some discovery from Liberty.

16 That discovery has been had. Depositions of two  
17 Liberty executives were taken on November 18th. The  
18 transcripts have been available since November 24th, and  
19 there's been no further filings with respect to the 56(d)  
20 motion or the summary judgment motion.

21 So, I would submit to you, your Honor, if the Court  
22 will deny the motion for 56(d) and there is no other  
23 opposition, the Court could enter judgment in favor of Liberty  
24 on the motion for summary judgment.

25 THE COURT: Okay. So, I will take that on the papers

1 and decide the 56(d) part of the motion. And you say that --  
2 or the parties are agreed that if the 56(d) motion is denied,  
3 then summary judgment should enter for the defendant?

4 MR. STRANCH: No, your Honor. That's not what we  
5 agreed to. Your Honor, Gerard Stranch for the Plaintiffs'  
6 Steering Committee.

7 The 56(d) that was filed in this case is basically  
8 the same one that was filed earlier on in a different  
9 matter -- in a different matter in front of the Court that the  
10 Court granted, and that's to -- that was against St. Thomas to  
11 allow us an opportunity to conduct some discovery.

12 Liberty has agreed to do some discovery, as I  
13 understand it, and that some of that discovery has gone  
14 forward now, but I'm not positive if it's all gone forward yet  
15 or not. It's supposed to be done, because, frankly, I'm not  
16 handling Liberty, but we did do some of the briefing on that  
17 in my shop, your Honor, and, you know, if all the discovery  
18 has been -- has all of it been done that was agreed to?

19 MR. SPEARING: All of it has been done with respect  
20 to Liberty that I know of. The depositions were concluded by  
21 the Plaintiffs' Steering Committee.

22 MR. STRANCH: Yes. Well, then it sounds like if the  
23 -- if we've gotten -- no, we have not done all the discovery,  
24 your Honor.

25 THE COURT: Would the plaintiffs kindly consult with

1 each other and --

2 MS. JOHNSON: If we could have a moment, your Honor.

3 THE COURT: -- and get one uniform response.

4 (Discussion off the record.)

5 THE COURT: Any reason not to hold this over until  
6 January 14th?

7 MS. JOHNSON: Yes, your Honor.

8 MR. SPEARING: Yes, your Honor. Yes, there is.

9 Liberty, as you'll see on the other part of the  
10 agenda, it has a declaratory judgment action with its insurer.  
11 The date for filing final opposition on the motion for summary  
12 judgment against the insurer lapses on the 29th. Liberty will  
13 not be filing an opposition.

14 That motion will enter and we could have lack of  
15 insurance coverage by the time that hearing comes around, your  
16 Honor. Liberty will be out of insurance. And at that point,  
17 due to its financials, it's going to have to file bankruptcy.

18 THE COURT: I thought it was in bankruptcy already.

19 MR. SPEARING: It has not filed yet, your Honor. We  
20 told the Plaintiffs' Steering Committee that there's been  
21 bankruptcy counsel hired. Schedules have been made. We were  
22 trying to see -- Liberty was trying to get as much as it could  
23 out of its insurer before then. That's the urgency of  
24 deciding the motion today, your Honor.

25 Just one last thing. I'm sorry.



1 With respect to discovery, we pushed and we got the  
2 Plaintiffs' Steering Committee two depositions they asked for.  
3 There was nothing else outstanding to Liberty.

4 It's my understanding that the PSC relied upon the  
5 56(d) motion solely. There is no other opposition. The time  
6 has elapsed to file such an opposition.

7 So, if the 56(d) is not proper, it doesn't meet the  
8 requirements, it seems to me that there is no other  
9 opposition. Summary judgment should enter.

10 THE COURT: Thank you. Ms. Johnson.

11 MS. JOHNSON: First, I apologize, your Honor, that  
12 the plaintiffs are not better prepared on this issue today.

13 I have asked my colleague to see if they can reach  
14 Mr. Jarnagin. If we're able to get him on the phone, we would  
15 like to have him briefly address this. Perhaps we can  
16 continue going through the remainder of the agenda.

17 The second point would be, it's my understanding that  
18 the 56(d) asked, in the alternative, for an opportunity to  
19 oppose if the 56(d) was denied. I believe that to be the  
20 case. We can look into it. If counsel disputes that, we can  
21 revisit it, but I believe that to be the pleading.

22 So, with that, perhaps we could return to the agenda.

23 THE COURT: Yes.

24 MS. JOHNSON: Well, after that snafu, the good news  
25 is I have good news, which is that --

1 THE COURT: Let me organize my papers first.

2 MS. JOHNSON: I do have additional copies of the  
3 agenda, your Honor, if that would be helpful.

4 THE COURT: When is Gururau Sudarshan on? Does that  
5 require a hearing?

6 MS. JOHNSON: It's not currently set for a hearing,  
7 your Honor. I have not spoken with the particular plaintiff's  
8 counsel for that case.

9 MR. ABELN: Your Honor, on behalf of CPM, Anthony  
10 Abeln, the moving party on the CPM issue.

11 It's a clinic case that arises out of Ohio issues of  
12 law, which we addressed in the last session relative to a  
13 different set of clinics, the BKC clinic. So, I think in  
14 discussions with the steering committee, we were going to wait  
15 for this Court's decision on that motion to dismiss. It may  
16 moot out all of the remaining issues on --

17 THE COURT: I'm sorry, which motion to dismiss?

18 MR. ABELN: The BKC motion to dismiss.

19 THE COURT: I have that, yes. All right. So, this  
20 should wait for BKC?

21 MR. ABELN: Yes, your Honor.

22 THE COURT: Okay.

23 MR. ABELN: Thank you.

24 THE COURT: So, now we go back to the agenda, and I  
25 am prepared to hear good news.

1 MS. JOHNSON: Good.

2 THE COURT: Liberty's counsel agree we will come back  
3 to it as soon as they have reconnoitered.

4 MR. SPEARING: Thank you, your Honor.

5 THE COURT: Thank you.

6 MS. JOHNSON: The good news, your Honor, is that the  
7 trustee filed yesterday a plan for reorganization in the  
8 bankruptcy along with the disclosure statement. Attached to  
9 that disclosure statement was a document I'd like to hand up  
10 for the Court's convenience, which is a summary of the Chapter  
11 11 plan and disclosure statement.

12 THE COURT: Do you have two copies of that, by any  
13 chance?

14 MS. JOHNSON: I do. I have several.

15 (Attorney Johnson hands documents to the Court.)

16 MS. JOHNSON: I'm going to address the specific  
17 contributions that are being made as part of that plan. Some  
18 of those are contributions being made by parties that were  
19 participating in this Court's mediation program. So, this  
20 will resolve those mediations.

21 NECC owners and shareholders are contributing between  
22 \$47.75 million and \$70 million. The --

23 THE COURT: Is this set out in this summary?

24 MS. JOHNSON: It is, your Honor, if you turn to the  
25 bottom of Page 3.

1 THE COURT: Okay.

2 MS. JOHNSON: The difference in that range -- the  
3 reason it's a range is that the 47.75 is the cash contribution  
4 that is being made. There are also some tax refund dollars  
5 that are anticipated, which is estimated to bring that  
6 contribution up to in the range of \$70 million.

7 There is also PMIC and Maxum contribution -- those  
8 are NECC's insurers -- for \$25.2 million; an Ameridose  
9 settlement of insurance coverage of \$10 million; a GDC  
10 settlement of \$3.75 million; an ARL settlement, who had been  
11 participating in the mediation program, of \$6.4 million; a  
12 Victory settlement, another mediation participant, of \$5.5.  
13 For a total contribution of this pocket as between \$98.6  
14 million and \$120.85 million.

15 There's then what I'll call the second pocket -- I'm  
16 not sure why I picked that noun -- which is a settlement with  
17 High Point, also a mediation participant, for \$3.5 million;  
18 and a settlement with Inspira, also a mediation participant,  
19 for \$16 million. The total amount of contribution as between  
20 those two clinic participants is \$19.5 million.

21 That leaves us, then, with one mediation participant  
22 that is not -- has not finalized the settlement, but is  
23 continuing to mediate, which is Insight, the clinic in  
24 Virginia. Given the posture with them, there are a few other  
25 Insight-related matters on the agenda, but the agreement

1 between the plaintiffs and counsel for Insight is those  
2 matters should be held off while that mediation continues.

3 I will pause for a moment, your Honor, because I  
4 think it is appropriate to recognize the tremendous amount of  
5 hard work that the trustee, his counsel, the creditor's  
6 committee and all of the lawyers that have had hands in this.  
7 It's many, many hands, your Honor, in pulling this together  
8 and from the PSC's perspective, every one is to be commended  
9 for the result that's been achieved here.

10 THE COURT: Well, I thank you for that, including  
11 your proposal. Thank you to all, and those of you who are on  
12 the telephone and to the mediator.

13 MS. JOHNSON: Yes, certainly.

14 Resolutions LLC, both Carmin Reiss and Eric Green  
15 have done a tremendous job here, your Honor. We're very  
16 grateful to have them.

17 In terms of the next steps in the plan, I think Mr.  
18 Gottfried will address that when we get to the bankruptcy  
19 update, but I just want to share the dollars and the results  
20 of the mediations up-front with the Court.

21 I think that brings us to agenda No. 2, which is the  
22 status of the declaratory judgment actions. Counsel for  
23 Liberty has already referenced that there is some activity in  
24 the declaratory judgment action to determine Liberty's  
25 insurance coverage.

1           There is a motion for extension of time filed  
2 extending the time to respond to the summary judgment motion  
3 until December 29th. So, there may be more to report on that  
4 front at the next status conference.

5           There's also, in terms of the Ameridose declaratory  
6 judgment action, a status conference before Judge Saylor set  
7 for January 5th, at 2 o'clock.

8           That then brings us to discovery, Item No. 3.

9           THE COURT: The first item there I think pertains to  
10 Judge Boal's order, right?

11           MS. JOHNSON: Yes, your Honor, and that order has  
12 been entered, and we wanted to share with the Court that the  
13 parties have been working very hard and have so far complied  
14 with those deadlines. Plaintiff profile forms went out for  
15 most defendants on schedule on November 17th. We also have an  
16 agreement with Unifirst that relates to the fact that they  
17 were in mediation when some of those deadlines were set, such  
18 that we agreed with counsel for Unifirst that we may serve  
19 plaintiff profile forms by December 22nd. So, merry Christmas  
20 to Unifirst.

21           In terms of 3-b., your Honor, that was set for  
22 argument today, but there has been resolution as between the  
23 parties. I understand that St. Thomas has agreed to respond  
24 to those interrogatories sometime mid December. The details  
25 are still being worked out.

1 THE COURT: If there is a hitch in that, it goes to  
2 Judge Boal.

3 MS. JOHNSON: Thank you, your Honor.

4 That actually raises -- the PSC has been wondering  
5 whether there might be a process that we could put in place so  
6 that certain pleadings were flagged, maybe by the Clerk's  
7 Office, as being sent -- referred automatically to Judge Boal.

8 THE COURT: Whatever you work out, I'm sure she will  
9 be happy to accommodate.

10 MS. JOHNSON: Okay. Thank you, your Honor.

11 So, we may file something to attempt to expedite that  
12 process a bit. Thank you.

13 MAGISTRATE JUDGE BOAL: May I just ask on 3-b., so  
14 should that motion be denied as moot now?

15 MS. JOHNSON: I think the preference of the parties  
16 would be, because they have not quite worked out all of the  
17 details, that it remain open for the time being and pending,  
18 but we will let you know as soon as those details have been  
19 worked out. It may be that -- I think the plaintiffs may want  
20 to actually have answers in hand before they withdraw that  
21 motion. So, it may be sometime in December.

22 That brings us, then, to the status of litigation  
23 track, No. 4. We've already addressed 4-a., the Liberty  
24 motions for summary judgment.

25 4-b., the PSC will be filing, we hope early next

1 week, an amended complaint against Unifirst -- well, I'm  
2 sorry. We'll be filing a motion for leave to file an amended  
3 complaint against Unifirst. Counsel for Unifirst has a copy  
4 of that. We're discussing whether or not they assent to that  
5 or not, but, in any event, we intend to file something next  
6 week.

7 THE COURT: You're not going to object to it, are  
8 you?

9 MR. BRACERAS: Likely not, your Honor, but we would  
10 like to be able to consider it.

11 MS. JOHNSON: That brings us to 4-c., which is  
12 request to be removed from the service list. I think we even  
13 addressed this last time, your Honor. From the plaintiffs' --

14 THE COURT: We agreed we would do it, didn't we?

15 MS. JOHNSON: Yes, we did. I had thought so. I'm  
16 not sure why we're still talking about it, but we will -- I'm  
17 not sure how we --

18 THE COURT: Is that something we have to do or do you  
19 do it?

20 MS. JOHNSON: I think the Court has to do it, but let  
21 me revisit this. We'll figure out how to take care of that  
22 and speak with the Court.

23 THE COURT: Okay.

24 MS. JOHNSON: That brings us to 4-d., which is  
25 Premier defendant's master answers to the complaint, and this



1 is mostly a housekeeping matter, your Honor. Premier has  
2 filed master answers, but the Court has not yet signed the  
3 order permitting them to file master answers. So, that is ECF  
4 No. 1553.

5 THE COURT: I'm sorry, what is 1553?

6 MS. JOHNSON: 1553 was a motion asking for an order  
7 that would permit Premier to file master answers and also  
8 permit plaintiffs to file master certificates of merit,  
9 effectively, and --

10 THE COURT: Is there objection to that?

11 MS. JOHNSON: There's no objection to that. It's  
12 completely agreed to, your Honor.

13 MR. WOLK: Your Honor, good afternoon. Christopher  
14 Wolk on behalf of the Premier defendants.

15 We do agree with the proposed order at Docket 1553.  
16 We worked out our differences with the PSC on that. They have  
17 agreed to allow us to file master answers to a representative  
18 selection of complaints that include and encompass all of our  
19 defendants. In New Jersey we have a requirement for an  
20 affidavit of merit for each individual defendant that must be  
21 served. Rather than having them serve 58 or so of those  
22 affidavits, we've agreed to accept one representative on  
23 behalf of each defendant. That's in the order that's at 1553.  
24 I think that can be entered by your Honor because there's no  
25 objection.

1 THE COURT: Okay. So, I should fish out 1553 and  
2 allow it?

3 MS. JOHNSON: Yes, please, your Honor.

4 THE COURT: Okay.

5 MR. WOLK: Thank you, your Honor.

6 MS. JOHNSON: That brings us to 4-e. MDL Order No.  
7 11 has been entered already. That order governs -- for the  
8 sake mostly of the attorneys on the telephone, that order  
9 governs automatic replies as right so long as they're ten  
10 pages or less, and please use less. Thank you.

11 THE COURT: What do you mean by "replies"? These are  
12 replies to the complaint or --

13 MS. JOHNSON: Replies in general, your Honor, and to  
14 briefs --

15 THE COURT: To briefing?

16 MS. JOHNSON: Yes. You've entered --

17 THE COURT: Ten pages for a reply?

18 MS. JOHNSON: Well, that's what your order said.

19 THE COURT: What about sur-replies?

20 MS. JOHNSON: Ten pages, also. We could certainly,  
21 your Honor --

22 (Laughter.)

23 MS. JOHNSON: We could certainly revisit that, your  
24 Honor. I had pushed for five pages personally.

25 THE COURT: Okay. I can just not read it.

1 (Laughter.)

2 THE COURT: I wouldn't do that.

3 MS. JOHNSON: Okay. MDL Order No. 11 also addresses  
4 automatic joint extensions and first requests for extensions  
5 of no more than ten pages or less. So, that order has been  
6 entered and we should all be abiding by it now.

7 And that brings us to No. 5, the status of the  
8 bankruptcy and I'll turn to Mr. Gottfried.

9 MR. GOTTFRIED: Thank you.

10 Good afternoon, your Honor. Michael Gottfried for  
11 the trustee, Paul Moore. As you --

12 THE COURT: You're welcome. You too have my thanks.

13 MR. GOTTFRIED: Thank you, your Honor.

14 As you heard earlier, we have -- the trustee and the  
15 official creditor's committee jointly filed a Chapter 11 plan  
16 and disclosure statement yesterday in the bankruptcy court.  
17 We filed our notice with this Court this morning. So, you  
18 have those documents in the record. You now have the PSC's  
19 summary as well.

20 The next steps are for Judge Boroff to schedule a  
21 hearing with respect to the adequacy of the disclosure and the  
22 notice requirements. Typically, that can be 30 to 45 days.  
23 Obviously, Judge Boroff has discretion as to what it will be.  
24 He hasn't set that yet, at least as I am aware of. So, it  
25 could be longer.

1           And then, again, typically, after that hearing  
2 results in an order with respect to the adequacy of the  
3 disclosure statement and the notice required, another period  
4 of similar length. So, we could, knock on wood, be in a  
5 situation where the plan is approved in, you know, 90 to 100  
6 days. Again, that's typical. Judge Boroff has discretion,  
7 obviously, to schedule those hearings, as and when he does.

8           I think what's important for this Court to hear is  
9 that yesterday before the plaintiffs filed, three of the  
10 settlements you heard about were actually signed, and there's  
11 still a very -- and I'll emphasize -- a very limited amount of  
12 time for the couple of parties that people are still talking  
13 with to reach settlements and be included in the plan, but  
14 once the disclosure statement is approved, the train has left  
15 the track. It's over. So, it could be as soon as three or  
16 four weeks. So, now is the time if those parties want to  
17 participate in the plan that has now been filed.

18           I guess the last thing I want to say is that I know  
19 the PSC certainly -- I thank many of the parties. I think the  
20 trustee also would like to thank the creditor's committee, the  
21 PSC and also the settling defendants. It was a great deal of  
22 work done to get this accomplished, and I know the trustee is  
23 very pleased to be in a position to provide this relief to the  
24 victims.

25           THE COURT: Thank you.

1 MS. TAYLOR: Briefly, if I may, your Honor. Kiersten  
2 Taylor for the creditor's committee.

3 I would like to echo my colleagues, Mr. Gottfried and  
4 Ms. Johnson. Kudos, really, to all the parties involved. It  
5 was a massive effort and really could not have been  
6 accomplished without coordination, really, I've never seen  
7 before.

8 THE COURT: Did anybody bring champaign?

9 MS. TAYLOR: I would be happy to go fetch some, your  
10 Honor.

11 THE COURT: Thank you.

12 MS. JOHNSON: I think that brings us to No. 7, your  
13 Honor, schedule for future status conferences.

14 I believe we have the January status set for the  
15 14th, both at 11:30 with Judge Boal and 2 o'clock with Judge  
16 Zobel.

17 THE COURT: Done.

18 MS. JOHNSON: And we would ask that we schedule the  
19 February status, if we could.

20 (Discussion off the record at the bench.)

21 THE COURT: When in February did you have in mind?  
22 At the end, I assume. The middle?

23 MS. JOHNSON: Sometime the second week in February,  
24 your Honor, if that works.

25 (Discussion off the record.)

1 MS. JOHNSON: I apologize. I'm told that doesn't  
2 work.

3 (Discussion off the record.)

4 MS. JOHNSON: Perhaps the first or third week of  
5 February instead, your Honor.

6 THE COURT: Well, I think the third because the first  
7 week would be only three weeks after the January one.

8 MS. JOHNSON: Yes. So, the third week.

9 COURTROOM DEPUTY CLERK URSO: Okay. The third week.  
10 We could do that Tuesday. We could do that Tuesday, at 2:00,  
11 February 17th, at 2:00.

12 MS. JOHNSON: Yes, your Honor, that works for the  
13 plaintiffs.

14 THE COURT: Are we likely to have motions again?

15 MS. JOHNSON: I expect that we will, your Honor, yes,  
16 but I think that --

17 THE COURT: So, we could do the same thing, starting  
18 with motions and then continue with the agenda.

19 MS. JOHNSON: I think that works well. It's also not  
20 likely to be a large number of motions. I think, given the  
21 briefing, it's probably two to three motions.

22 THE COURT: The number doesn't make any difference.  
23 It's my ability to keep counsel to a small number of minutes.

24 MS. JOHNSON: You do and --

25 THE COURT: I was totally unsuccessful this morning,

1 as you saw.

2 MS. JOHNSON: My partner and I failed you this  
3 morning, although I didn't say a word. I didn't say a word in  
4 my motion. You didn't want to hear from me this morning.

5 COURTROOM DEPUTY CLERK URSO: So, 2:00 on the 17th,  
6 and that will be it for that afternoon, correct?

7 THE COURT: Yes.

8 MS. JOHNSON: And does that also -- not meaning to  
9 put you on the spot, Judge Boal, but does that also work for  
10 you?

11 MAGISTRATE JUDGE BOAL: Yes.

12 THE COURT: Judge Boal will be here if she wants to  
13 be, despite the fact that she's also involved in the morning  
14 on her own.

15 MS. JOHNSON: Thank you, both of you.

16 That then brings us to two issues we just wanted to  
17 briefly mention with the Court. I don't think there's  
18 anything that needs to be done on them.

19 There have been a series of filings by a pro se  
20 plaintiff -- a few pro se plaintiffs.

21 THE COURT: What does he want?

22 MR. STRANCH: Money.

23 (Laughter.)

24 MS. JOHNSON: It's unclear to me, your Honor, but it  
25 does raise an issue. In many MDLs someone is appointed a

1 liaison to the pro se. By definition, pro se plaintiffs are  
2 not represented by counsel. So, the Plaintiffs' Steering  
3 Committee can't truly speak for them.

4 THE COURT: Did that include King?

5 MS. JOHNSON: Exactly, your Honor.

6 It has not seemed so far to the PSC as though that  
7 were necessary, but as this is starting to become more  
8 prevalent in the docket, at least, it's something that the PSC  
9 is considering suggesting if the Court appoint a person for  
10 that position.

11 THE COURT: A member of the PSC or somebody else?

12 MS. JOHNSON: No. I think, more appropriately, your  
13 Honor, it would be someone that has some familiarity with this  
14 litigation, but should not be a member of the PSC, and it  
15 would not be...

16 THE COURT: The rest of you can hide.

17 MS. JOHNSON: I'm looking around. Can we suggest  
18 someone to the Court?

19 THE COURT: Yes, please do.

20 MS. JOHNSON: Okay. Thank you. We will do that.

21 Finally, that brings us, then, to agenda No. 9. The  
22 Plaintiffs' Steering Committee, actually, me personally, I had  
23 written a letter to Judge Boal as part of the bankruptcy plan  
24 to ascertain whether or not Judge Boal may be interested in  
25 filling a role related to the plan. That letter was then



1 ECF'ed on the docket in redacted form because it included some  
2 details about the plan that were not at that point publicly  
3 available.

4 Now that the plan has been filed, we will file an  
5 unredacted version of that letter in the docket. So, for all  
6 to see.

7 THE COURT: And the letter says, in essence, what?

8 MS. JOHNSON: It asks Judge Boal whether or not she  
9 was interested in fulfilling a special master or magistrate  
10 function related to the plan settlement.

11 THE COURT: Is this a proposal that is generally  
12 agreed by all parties or do the defendants have no interest in  
13 it? Certainly, the settling defendants may or may not.

14 MS. JOHNSON: Well, none of the defendants would have  
15 an interest in it from this perspective, your Honor. This is  
16 a role that would simply be hearing appeals.

17 THE COURT: It's a Ken Feinberg role?

18 MS. JOHNSON: Certainly a role Ken Feinberg has  
19 played before, yes. The role was --

20 THE COURT: I'm not suggesting that he should be  
21 nominated.

22 MS. JOHNSON: Well, it's funny that you say that.

23 (Laughter.)

24 MS. JOHNSON: The role would be to have heard appeals  
25 from a matrix distribution process that would have been

1 approved as part of the plan. This would be a person who  
2 would then be reviewing point awards and determinations if  
3 people chose to appeal. It is an objective formula, if you  
4 will, for how the plan contemplates that awards are made. So,  
5 there's no subjective determination as to which client should  
6 get which money. It's sort of is the math correct, have we  
7 counted up the points the right way.

8 THE COURT: Is it for Judge Boroff or this Court to  
9 appoint somebody?

10 MS. JOHNSON: I'm not sure that it's either, your  
11 Honor, in the sense that --

12 MR. ELLIS: Your Honor, the person is going to be  
13 appointed under the plan, under the plan documents itself.  
14 So, we asked Judge Boal if she would be interested in serving  
15 in that role. We have also set out requests for proposal to a  
16 variety of other former judges.

17 THE COURT: You will?

18 MR. ELLIS: We have. And those proposals are due in  
19 on Friday. So, we have an alternative if Judge Boal does not  
20 feel comfortable serving in that role.

21 THE COURT: Well, I'll discuss it with Judge Boal and  
22 see where we are.

23 Is there any -- Judge Boroff has no interest in -- I  
24 mean, you know you sent him the letter, but he has no interest  
25 in appointing somebody just to sort of monitor and execute the

1 plan? That's what -- execute the plan with respect to the  
2 distribution.

3 MS. JOHNSON: The specific role as a special master  
4 that we had asked Judge Boal to consider is limited to hearing  
5 appeals from an award. There are other appointed entities  
6 that will actually do the math, in the first instance, and  
7 also oversee the tort trust. So, this is a cabin position  
8 that is specifically hearing those appeals, your Honor.

9 Now, what has been done in the plan is suggestions  
10 will be made by parties as to who should fill these particular  
11 roles that are necessarily to be appointed by Judge Boroff and  
12 Judge Boroff would ultimately okay those suggestions.

13 THE COURT: For the people who distribute initially,  
14 but the appeals would not be included in Judge Boroff's  
15 recommendations?

16 MS. JOHNSON: No. It would be included, your Honor.  
17 So, we would recommend someone to fill that role to Judge  
18 Boroff and Judge Boroff would sign off on and accept those  
19 recommendations.

20 MR. ELLIS: Your Honor --

21 COURT REPORTER: Could you go on mic? I can't hear  
22 you.

23 MR. ELLIS: I'm sorry.

24 THE COURT: Why don't you sit down, because the  
25 people on the phone, if there are still any left, need to hear

1 you, too.

2 MR. ELLIS: Rick Ellis for the plaintiff.

3 There will be a settlement administrator appointed in  
4 the plan itself named. They will process all the claims. If  
5 somebody is dissatisfied, they can appeal to a special master.  
6 So, there's two separate roles under the plan.

7 THE COURT: Mr. Rehnquist.

8 MR. REHNQUIST: Can you hear me?

9 Your Honor, it seems to me that the Plaintiffs'  
10 Steering Committee is asking for what is, essentially, a  
11 judicial action for Judge Boal to serve as a master. It's  
12 been done by letter.

13 I'm not sure we have an objection or not, but I think  
14 it should at least be done by motion so we have a vehicle to  
15 object once we've seen it laid out, the legal authority, and  
16 so forth. There's a rule on masters. I don't know if this is  
17 appropriate or not.

18 MR. ELLIS: Judge, I don't think they have any  
19 standing to object to it.

20 THE COURT: Well, I don't --

21 MR. REHNQUIST: Well, this is a magistrate that's  
22 going to be presiding over things involving us for the next  
23 couple of years. I think --

24 THE COURT: It won't involve you unless you kick into  
25 the fund.

1 (Laughter.)

2 MR. REHNQUIST: Maybe, maybe not.

3 THE COURT: All right. Well, until you've kicked in,  
4 I don't know that you have any standing to either approve or  
5 not.

6 MR. REHNQUIST: Well, this is -- Judge Boal is going  
7 to be dealing with discovery matters involving us and all  
8 kinds of other substantive matters over the next couple of  
9 years, at the same time presiding over a settlement process.  
10 I'm just not sure that's appropriate.

11 MS. JOHNSON: I would suggest, your Honor, that the  
12 logical starting point for this would be for us to file the  
13 unredacted letter, which provides quite a bit of information  
14 about what the role does and does not involve. We will do  
15 that as soon as possible.

16 I suggest -- I agree with my colleagues here who are  
17 suggesting Unifirst doesn't really have any skin in this  
18 particular game one way or the other, but, in any event, let's  
19 make it clear what --

20 THE COURT: Yet.

21 MS. JOHNSON: Even then, your Honor. Even  
22 optimistically, even then, I don't think they do.

23 But, in any event, I want us to be clear what our  
24 position is, so that they can then appropriately respond.

25 MAGISTRATE JUDGE BOAL: In those papers I think it

1 would also be helpful to address -- Mr. Rehnquist is correct  
2 that there's a separate rule on special masters. There's also  
3 a provision in there that excerpts out things that are  
4 referred to a magistrate judge, depending on whether or not  
5 you use the special master title, but, also, I think in  
6 thinking about this as well, is whether such an action by  
7 someone who was a magistrate judge, whether that might run  
8 afoul of the preclusion on magistrate judges rendering  
9 dispositive decisions and whether this could be considered  
10 dispositive. And if so, whether it would have to be done in a  
11 report and recommendation to Judge Zobel.

12 MS. JOHNSON: We will address that.

13 (Discussion off the record.)

14 MS. JOHNSON: I understand that we have not been able  
15 to reach Mr. Jarnagin. Mr. Lipton, his colleague, is on the  
16 phone and is able to address the motion if the Court is still  
17 interested in hearing argument on the Liberty 56(d) motion.

18 THE COURT: I thought we were going to postpone it  
19 for the time being until you can work it out and let me know  
20 where we are and until we know what the court in California --  
21 what the probate court is doing.

22 MS. JOHNSON: This is the Liberty motion, your Honor.

23 THE COURT: Oh, this is liberty. Okay.

24 MS. JOHNSON: If you're interested in hearing  
25 argument, Mr. Lipton can do that now. We're also willing to

1 try to re-schedule, perhaps, for telephonic argument next week  
2 sometime.

3 THE COURT: I would prefer to go through the agenda  
4 rather than jumping back and forth. If there's time at the  
5 end of it, I have no problem in hearing -- Mr. Lipton, is it?

6 MS. JOHNSON: Yes.

7 MR. LIPTON: Lipton. I'm not sure I can even be  
8 heard.

9 THE COURT: We hear you loudly and clearly, but I  
10 think I would prefer to have -- I would prefer to continue  
11 with the agenda, which is not a whole lot longer, and then  
12 come back to this motion rather than going back and forth  
13 between motion and agenda, okay? So, hang around.

14 MR. LIPTON: Sure.

15 THE COURT: Thank you.

16 MS. JOHNSON: On Item 10, discovery-related motions,  
17 this was heard by Judge Boal this morning.

18 Item 11 relates to the Insight matters and,  
19 therefore, should be held over until mediation there resolves  
20 one way or the other.

21 MAGISTRATE JUDGE BOAL: Could we just have a moment?

22 (Discussion off the record at the bench.)

23 MAGISTRATE JUDGE BOAL: Thank you.

24 THE COURT: Okay. So, the Virginia matters. I mean,  
25 I see there's objection to it, but I can't imagine why.

1 MS. JOHNSON: The agreement between the parties is  
2 that while the mediation is ongoing, this briefing and all the  
3 other briefing on Insight-specific issues should not be  
4 addressed by the Court.

5 THE COURT: Okay.

6 MS. JOHNSON: Because the mediation may well moot  
7 these issues.

8 THE COURT: All right. We'll hold pending mediation.

9 MS. JOHNSON: On 12, I believe all of those are  
10 assented-to motions for extension of time that now were taken  
11 care of by MDL Order 11. So, I think we're fine.

12 And on 13, my partner, Mr. Notargiacomo would like to  
13 be heard briefly.

14 MR. NOTARGIACOMO: Your Honor, No. 13 relates to a  
15 summary judgment motion by Hahnemann University Hospital  
16 against a case filed by a pro se plaintiff, Norma King.

17 THE COURT: Didn't I say in a prior order that if she  
18 didn't have counsel by November 12th, then default would be  
19 entered?

20 MR. NOTARGIACOMO: You did, your Honor, and I'm just  
21 here to report that I had a conversation with her to find out  
22 exactly, because I knew this would come up. She's represented  
23 that she does not -- she represented to me and asked me to  
24 represent to the Court that she does not have counsel.

25 THE COURT: Well, in that case, file a motion for



1 notice of default.

2 MR. NOTARGIACOMO: She was aware of the November 12th  
3 deadline as well.

4 MR. WALKO: Your Honor, Matthew Walko for the moving  
5 parties in that case, Hahnemann University Hospital.

6 We have a proposed form of order on the pending  
7 motions, if your Honor is interested, that might expedite  
8 things along.

9 THE COURT: You have it?

10 MR. WALKO: I have it to hand up.

11 THE COURT: Okay. Let Ms. Urso have it, and I'll  
12 allow it.

13 (Attorney Walko hands document to the Court.)

14 MS. JOHNSON: I think that brings us to No. 14, your  
15 Honor, which is Encino. We've already argued that, as well as  
16 15, earlier.

17 16 is Liberty's motion for summary judgment.

18 THE COURT: Okay. Which we've also discussed.

19 MS. JOHNSON: Yes. And 17, we have the Ascension  
20 parties' motion to certify. I understand the parties have  
21 agreed to have that heard next time.

22 THE COURT: Excuse me. Hold it one second, please.

23 (Pause.)

24 THE COURT: Okay.

25 MS. JOHNSON: Let me correct myself on No. 17. That

1 motion was briefed by Mr. Gastel, a member of the PSC, who is  
2 currently on trial and not here today. The PSC does not ask  
3 that that motion be heard today.

4 THE COURT: So, 54(b) remains in limbo?

5 MS. JOHNSON: I don't know whether Ascension's  
6 counsel wishes to be heard on that item.

7 MS. PUIG: Your Honor, we're here. Yvonne Puig for  
8 the Ascension parties. We're ready to argue it. There must  
9 be some misunderstanding about it. If the Court wants to  
10 defer until January 14th, we'll honor your request, but we are  
11 prepared to argue today.

12 THE COURT: Let's do it on January 14.

13 MS. PUIG: Thank you, your Honor.

14 THE COURT: Is it fully briefed by both parties?

15 MS. PUIG: Yes, it is, your Honor.

16 THE COURT: Okay.

17 MS. JOHNSON: That brings us to the briefing in  
18 progress, your Honor, none of which I think we need to discuss  
19 at this time.

20 THE COURT: So, that's it?

21 MS. JOHNSON: That's it.

22 THE COURT: Except for Mr. Lipton.

23 MS. JOHNSON: Yes.

24 THE COURT: And Mr. Lipton had to do with Liberty?

25 MS. JOHNSON: The Liberty summary judgment -- well,

1       rather, the PSC's 54(d) motion -- 56(d) motion in response to  
2       the Liberty summary judgment.

3               THE COURT: Mr. Lipton, are you there?

4               MR. LIPTON: I am, your Honor. Lipton, like the  
5       soup.

6               THE COURT: Lipton, like the tea?

7               MR. LIPTON: No problem. Yes, it is tea, too, that  
8       of which I have an interest in.

9               THE COURT: Okay. So, we were talking earlier about  
10      the 56(d) motion concerning Liberty's motion for summary  
11      judgment, and you wish to be heard on it. So, I will hear  
12      you, but no more than ten minutes.

13              MR. LIPTON: Your Honor, I don't really have even ten  
14      minutes to say on it. I apologize for not being on the phone  
15      earlier. I just found out moments ago that my colleague  
16      wasn't able to make the call. So, I don't have the advantage  
17      of knowing everything that was said before. I think the  
18      motion speaks for itself.

19              As I understand the procedural posture, Liberty  
20      brought a motion for summary judgment. We filed a response  
21      rather than a separate motion, but a response just saying that  
22      under 56(d), we are told the discovery.

23              I point out the timeline to the Court, which is that  
24      there was a stay of discovery as to all entities, including  
25      Liberty. We did exchange documents that -- we had subpoenaed

1 records from them before -- I think even before the master  
2 complaint had been filed. So, there was definitely an  
3 exchange of documents.

4 But as far as taking depositions or formal discovery,  
5 there had been a stay for a long time and, literally, on the  
6 very first day that the parties -- the PSC was entitled to  
7 conduct discovery -- just so I'm clear, your Honor, I am a  
8 member of the PSC, and on that first day we had arranged with  
9 counsel for Liberty to depose Mr. Ericson and -- I forget the  
10 other gentleman's off the top of my head, but, in any event,  
11 the current CEO and then one of the gentlemen from Liberty,  
12 and those depositions were completed November 18th.

13 So, you know, we -- which was then, I believe, right  
14 after -- right before our response to 56(d) motion was -- or  
15 the summary judgment motion was due.

16 So, I mean, you know, it's -- I appreciate Liberty's  
17 financial circumstances, its desire to bring this to a head as  
18 promptly as possibly and to some extent, I'm sympathetic, but  
19 at the end of the day, I'm also sympathetic to the thousand  
20 people or so that suffered serious injuries in this event, and  
21 we have a right to conduct discovery. The master complaint  
22 lays out a valid cause of action, and this motion is really a  
23 summary judgment based on fact.

24 THE COURT: Mr. Lipton, what additional discovery do  
25 you need?

1 MR. LIPTON: Your Honor, all we've done at this point  
2 is take the depositions of two people from Liberty --

3 THE COURT: What additional -- what more discovery do  
4 you need?

5 MR. LIPTON: Your Honor, to be frank, we are not even  
6 sure at this point exactly what room the drugs were  
7 manufactured in, compounded in. I mean, we've got a good idea  
8 based upon statements made to us by the trustee, but not in  
9 any admissible fashion.

10 I've got to share the results of the deposition about  
11 what Liberty did with experts. I have to have them review it.  
12 I have to have them determine if there's a basis for  
13 establishing causation --

14 THE COURT: Mr. Lipton, I'm not talking about all the  
15 stuff you got to do once you get the information. What  
16 additional information are you looking for? You know, the  
17 56(d) motion says you want time to get additional discovery.  
18 What discovery are you looking for besides the depositions and  
19 whatever else you have?

20 MR. LIPTON: Well, your Honor, I mean, I've taken two  
21 depositions. I have taken a deposition of the defendant  
22 itself and --

23 THE COURT: Would you please answer my question, Mr.  
24 Lipton. What additional discovery do you want? I understand  
25 you've taken two depositions. I understand there's been some

1 discovery and some documents, and so on. What additional  
2 deposition discovery do you want?

3 MR. LIPTON: Your Honor, I apologize. I have to --  
4 if you give me a moment here.

5 (Pause.)

6 MR. LIPTON: I'm looking at our response and I am --  
7 and I'm, frankly -- you know, I guess what I would say is  
8 this, your Honor, because this was just put on me in the last  
9 ten minutes.

10 My view is that we probably have most of what we  
11 need, but it is not -- I'm not in a position -- at the time  
12 that our response was due and filed, 56(d) response was  
13 October 31st, to be able to tell you at that point and respond  
14 to the motion for summary judgment that had been filed by  
15 Liberty.

16 Today, having taken the depositions on November 18th,  
17 I can go back, consult with my experts and have them tell me  
18 if we have enough to establish a cause of action against  
19 Liberty.

20 THE COURT: How much time will it take you to do  
21 that?

22 MS. JOHNSON: I would suggest one week, your Honor,  
23 if you could give us one week to do that.

24 THE COURT: What is the deadline for you? I'm asking  
25 counsel for Liberty.

1 MR. LIPTON: I understand.

2 MR. SPEARING: Liberty will run out of coverage  
3 shortly after December 29th, your Honor, shortly after  
4 judgment is entered.

5 THE COURT: So, if they tell me in a week, that would  
6 be January -- December 11th.

7 MR. SPEARING: Well, your Honor, what are we going to  
8 hear in a week? That they had all these documents for over a  
9 year and a half. All it is in the 56(d) -- and the Court can  
10 look at it -- is a mere recitation of what's in the complaint.  
11 If there's no good basis to bring the complaint, to begin  
12 with, is what it sounds like to me, they don't understand what  
13 the case is or what the causation is, then the 56(d) should  
14 fail.

15 THE COURT: Mr. Lipton, tell me by December 9th, in a  
16 letter or a statement, or whatever means you want to use, what  
17 additional discovery you need and why you need it, and then --  
18 and, obviously, counsel for Liberty should be copied on that,  
19 and then I will decide whether the 56(d) motion lies.

20 MR. LIPTON: Your Honor, can I just make one point  
21 here?

22 Let me just get the timeline straight here. On  
23 October 31st I did not have the depositions. I may be able to  
24 respond today -- or not today, but over the next week or two  
25 weeks, whatever it takes, to Liberty's motion for summary

1 disposition, because -- I mean, it is my view and it's the  
2 PSC's view, that there's a question of fact as to elements  
3 such as causation and Liberty's damages. You know, because of  
4 the way the motion got filed, at that time we hadn't even done  
5 the deps and my response was due, with no right to file even a  
6 supplemental brief. So --

7 THE COURT: I understand you have a problem. I  
8 understand you have a problem. But what's wrong with my  
9 suggestion that you tell me by next Tuesday, the 9th, where  
10 you are?

11 MS. JOHNSON: Absolutely.

12 THE COURT: I'm giving you time to do that.

13 MS. JOHNSON: There is absolutely nothing wrong with  
14 that, your Honor. The Plaintiffs' Steering Committee will let  
15 you know by that date.

16 THE COURT: I understand Mr. Lipton's difficulties,  
17 but right now we are all in a problem, particularly Liberty  
18 itself.

19 MR. LIPTON: No one is more sensitive to that than I  
20 am.

21 THE COURT: I'm sorry, I didn't get that.

22 MR. LIPTON: I understand. I understand the issues  
23 with regards to Liberty.

24 THE COURT: Okay. So, by December 9th, which is next  
25 Tuesday, you will file some kind of a document that tells us



1 exactly where you stand on Liberty's motion for summary  
2 judgment and the Rule 56(d) motion, and then we can have  
3 further discussion, if necessary, or I can rule or I can do  
4 whatever.

5 MR. SPEARING: Just so I'm clear, he is going to  
6 supplement somehow the 56 --

7 THE COURT: He's going to tell us whether he needs  
8 the 56(d) and if so, what he needs it for.

9 MR. SPEARING: And that we --

10 THE COURT: He may not need it. He may have a  
11 discussion with each other, deciding that they really don't  
12 need it, and in that case, you're free and clear.

13 MR. LIPTON: Your Honor, just even if -- I don't mean  
14 to interrupt, but even if Liberty -- even if it turns out we  
15 don't need more discovery, it doesn't mean that -- that we're  
16 not in a position to respond to Liberty's summary judgment  
17 motion.

18 THE COURT: I will deal with that at the time once I  
19 know where you are.

20 MR. LIPTON: Okay.

21 THE COURT: And if, in fact, you decide that you  
22 haven't got much of a case against Liberty, you might as well  
23 tell me so instead of filing the responsive pleadings. I  
24 think Ms. Johnson will be in charge of this.

25 MS. JOHNSON: Yes, I will, your Honor.

1 MR. SPEARING: One last thing, your Honor.

2 The 56(d), there was no opposition. So, under the  
3 rules, there is no time to file an opposition to summary  
4 judgment motion. That's not what 56(d) is for. That's my  
5 only point I want to make.

6 THE COURT: Okay.

7 MS. JOHNSON: Thank you very much, your Honor.

8 THE COURT: I think we are all done. Is there  
9 anything else that anybody wishes to discuss?

10 MS. JOHNSON: Nothing.

11 THE COURT: Again, I thank you all. And I guess to  
12 the extent that I don't see you, I hope you have some terrific  
13 holidays.

14 MR. STRANCH: Thank you, your Honor.

15 MS. JOHNSON: Thank you, your Honor.

16 (Adjourned, 3:16 p.m.)

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## C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 58, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In Re: New England Compounding Pharmacy, Inc., Products Liability Litigation.

December 9, 2014  
Date

/s/Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR